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SERVICE DATE – DECEMBER 10, 2003

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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34429]

The New York City Economic Development Corporation–Petition for Declaratory Order

AGENCY: Surface Transportation Board.

ACTION: Institution of declaratory order proceeding; request for comments.

SUMMARY: The Surface Transportation Board is instituting a declaratory order proceeding and requesting comments on the petition of the New York City Economic Development Corporation (NYCEDC), acting on behalf of the City of New York, NY (City), for an order confirming that: (1) pursuant to 49 U.S.C. 10906, the construction project described in the petition is construction of spur or switching track that does not require Board approval; and (2) under 49 U.S.C. 10501(b)(2) and 10901, federal law preempts the State of New York and the City from requiring permits or other prior approval with respect to the construction proposed here.

DATES: Any interested person may file with the Board written comments concerning NYCEDC's petition by January 9, 2004. Replies will be due on January 29, 2004.

ADDRESSES: Send an original and 10 copies of any comments referring to STB Finance Docket No. 34429 to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.

In addition, send one copy of any comments to petitioner's representative: Charles A. Spitulnik,

McLeod, Watkinson & Miller, One Massachusetts Avenue, N.W., Suite 800, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877-8339.]

SUPPLEMENTAL INFORMATION: By petition filed on October 29, 2003, NYCEDC asks the Board to institute a declaratory order proceeding to confirm that: (1) the construction project described in the petition involves the construction of spur or switching track that does not require the Board's approval; and (2) federal law preempts all otherwise applicable state and local laws with respect to this project.

NYCEDC states that the proposed construction project consists of the addition of a spur and/or switching track to, and the rehabilitation of, the end of the Travis Branch of the Staten Island Railroad (SIRR).¹ According to NYCEDC, this construction project is one part of a plan, called the Staten Island Railroad Reactivation Project, for reactivation of the operations of the former SIRR. On October 22, 2003, the Port Authority of New York and New Jersey (Port Authority) filed a petition for a declaratory order with respect to the proposed construction of a connector between the SIRR and the Chemical Coast Secondary Line. The Board issued a notice instituting a declaratory order

¹ Petitioner indicates that the Board will soon receive a notice of a modified certificate of public convenience and necessity pursuant to 49 CFR 1150.21-.24, advising of the designation of CSX Transportation, Inc. and Norfolk Southern Railway Company as the modified certificate operators of certain lines of the SIRR that had been abandoned and then acquired by the City of New York and the State of New Jersey.

proceeding and requesting comments on the Port Authority's petition. Port Authority of New York and New Jersey–Petition for Declaratory Order, STB Finance Docket No. 34428 (STB served Nov. 18, 2003). NYCEDC and the Port Authority are in the process of completing major upgrades to the SIRR to enable freight rail movements between Staten Island and the Howland Hook Container Terminal there, on the one hand, and freight rail lines in New Jersey, on the other.

According to petitioner, the segment of the SIRR on which the new track will be built is owned by the City and is managed by NYCEDC pursuant to a contract with the City. NYCEDC claims that the new track is required for the efficient pick up of trains from, and delivery to, a City Department of Sanitation facility (DSNY facility) being constructed on City-owned property at the Fresh Kills landfill site on Staten Island. NYCEDC states that the total length of the right-of-way for the new track will be approximately 6,744 feet, and that the track layout has been designed to minimize interference with the access roads from Victory Boulevard to the Visy Paper and Arthur Kill Power properties. The project will also entail replacing existing timber trestle bridges and timber and bituminous grade crossings, constructing a new Wye connection and potential retaining walls, replacing and repairing tracks at Arlington Yard, repairing and painting the Arthur Kill Lift Bridge, and constructing, replacing, and repairing bridges and bridge underpinnings.

NYCEDC indicates that rail service to and from the DSNY facility will be in unit trains approximately 4,700 feet long and will require that the trains be broken into sections. Petitioner maintains that the disassembly of empty railcar sections in an arriving unit train, and the assembly of full railcar sections into a unit train, will occur in two areas of the right-of-way that have a double-tracked

rail layout. These sections are: (1) south of the Visy Paper entrance road and extending across Victory Boulevard and the Consolidated Edison property to the box culvert rail bridge; and (2) at the northern end of the Arthur Kill Power property.

The Board does not exercise licensing authority “over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” 49 U.S.C. 10906. The determination of whether a particular track segment is a “railroad line” requiring Board authorization under 49 U.S.C. 10901(a), or an exempt spur, industrial, team, switching, or side track, turns on the intended use of the track segment. Nicholson v. I.C.C., 711 F.2d 364, 368 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984). According to NYCEDC, the intended use of the new track is for switching and for pick up and delivery to and from the DSNY facility. NYCEDC further claims that the new track is switching track according to the factors considered in CNW–Aban. Exemp.–In McHenry County, IL, 3 I.C.C.2d 366 (1987), rev’d on other grounds sub nom. Illinois Commerce Com’n v. ICC, 879 F.2d 917 (D.C. Cir. 1989), because the track is not long, will serve only one shipper,² is stub-ended, and will not invade the territory of another railroad or expand the involved market.

Petitioner argues that this case is materially different from Effingham Railroad Company–Petition for Declaratory Order–Construction at Effingham, IL, STB Docket No. 41986 (STB served Sept. 12, 1997) (Effingham), in which the Board found that construction of a “stub-ended

² Petitioner states that there is a possibility that another shipper, Visy Paper, may build a lead into its plant from the new track.

track that would be used exclusively for switching to and from present and future shippers in an industrial park” fell within its jurisdiction. Id. Petitioner argues that Effingham involved a “new carrier” and a proposal to construct a track that would constitute the new carrier’s entire operation, whereas in this case the track is ancillary to and supplemental to the SIRR.

NYCEDC says that it has advised the New York State Department of Environmental Conservation (NYSDEC) of its plans for the proposed construction as they have developed. Petitioner asserts, however, that NYSDEC is attempting to impose permitting and other requirements on it, including the implementation of the state environmental review process, and further asserts that its applications for the permits required by NYSDEC for fill to tidal wetlands have been pending for eleven months and remain unresolved.³ NYCEDC contends that the state and local permitting and pre-clearance requirements imposed by NYSDEC give that body the ability to impede petitioner’s construction of the facilities that are necessary to conduct operations.

NYCEDC maintains that, even though 49 U.S.C. 10906 removes from the Board the authority to approve the construction of the new track, the Board’s jurisdiction over the track and its construction prevents any agencies of the state or local governments from imposing regulations or requirements that would have the effect of interfering with the project as it moves forward. According to petitioner, the Board has exclusive and plenary jurisdiction over rail transportation to the extent that it involves “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial,

³ According to petitioner, this review is being made pursuant to the New York State Environmental Quality Review Act, N.Y. Env’tl. Conserv. Law § 8-101, et seq. (McKinney 2003).

team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state.’⁴ NYCEDC further argues that state and local permitting or pre-clearance requirements (including environmental requirements) are preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations. Petitioner maintains that the requirements that NYSDEC is seeking to impose here, based on state law, are preempted because they go beyond permissible “police power” regulation and amount to impermissible permitting and environmental review requirements.

Finally, NYCEDC asks the Board to expedite its handling of this petition. Specifically, petitioner asks the Board to issue its order in November 2003, i.e., within 30 days of the filing of the petition. Petitioner maintains that the construction season in New York is short, and that it must begin offering construction contracts for bid immediately to allow contracts to be let in time for construction to commence according to schedule.

Granting this request would effectively preclude giving the public notice of and an opportunity to comment on this proceeding. The Board needs to afford notice and an opportunity for comment, given the importance of the project.⁵ The Board will process this petition as expeditiously as possible, but must and will provide adequate time for the solicitation, receipt, and consideration of public comments.

⁴ In support, petitioner cites 49 U.S.C. 10501(b)(2) and Friends of the Aquifer, et al., STB Finance Docket No. 33966 (STB served Aug. 15, 2001).

⁵ Moreover, on November 19, 2003, NYSDEC filed a pleading in this matter indicating its intent to submit opposition to the petition and seeking time in which to do so.

By this notice, the Board is requesting comments on NYCEDC's petition.

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

Decided: December 4, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary